U.S. DEPARTMENT OF LABOR

SECRETARY OF LABOR
WASHINGTON, D.C.

DATE: July 8, 1987
CASE NO. 86-ERA-11

IN THE MATTER OF

W. ALLAN YOUNG,
Complainant,

v.

E.H. HINDS,
Respondent,

BEFORE: THE SECRETARY OF LABOR

DECISION AND ORDER OF REMAND TO
THE WAGE AND HOUR ADMINISTRATOR

This case is before me pursuant to the employee protection provision of the Energy Reorganization Act (ERA), 42 U.S.C. § 5851(a) (1982),[1] and the regulations promulgated thereunder at 29 C.F.R. Part 24.

The facts involved in this appeal are straightforward. W. Allan Young (Complainant) filed a complaint with the Wage and Hour Division of this Department in which he alleged that

he had been discharged by E.H. Hinds (Respondent), "a contractor or subcontractor of a Nuclear Regulatory Commission Licensee," in violation of the ERA. In his complaint, Complainant set forth the facts which constitute the basis of his charge of alleged discrimination.

The Area Director of the Wage and Hour Division responded to the complaint as follows:

> Our factfinding into this matter determined that the employee protection provisions of the Acts do not extend to the situation described in your complaint. The protection provisions provide no basis for a complaint against a prospective employer.

Letter of December 4, 1985, from Michael J. Corcoran to W. Allan Young.

Complainant appealed the Area Director's finding and a hearing was held before an Administrative Law Judge (ALJ). The sole issue was "whether the Complainant could be considered as an 'employee' under the employee protection provisions of the ERA." Recommended Decision and Order (R. D. and O.) at 2. This issue was stipulated to by the parties who also agreed that if it were found that "Complainant's situation is covered by the ERA, then the complaint would be remanded . . . for an investigation of the facts alleged by the Complainant in his complaint." R. D. and O. at 2.[2]

The ALJ's R. D. and O. relates the factual background leading to the complaint and it is unnecessary to repeat it in full. Complainant is a pipefitter and welder who obtains employment through job referrals from his local union. Companies requiring the services of plumbers or pipefitters for short periods contact the union which assigns workers from an "out-of-work list." R. D. and O. at 2. On two occasions Complainant was assigned to work for Respondent as a pipefitter and on both occasions he was given a "payroll removal notice" form because of lack of a security clearance. R. D. and O. at 2-3.[3] It was after the second removal that Complainant filed his complaint.

The ALJ found that:

> Complainant engaged in protected activity and was later discharged from employment for reasons that he believed were motivated by his protected activity. However, the

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[Page 3]

> Employment Standards Administration denied his complaint on the basis that the employee protection provisions provide no basis for a complaint against a prospective employer.

R. D. and O. at 4. He concluded as follows:

> After a review of the facts and the applicable law, it is determined that the employee protection provisions of the ERA do extend to the situation at hand as Complainant was an employee of the Respondent at the time he was discharged.

Id.

The ALJ found that Complainant was under Respondent's supervision and control while he was at the power plant, that Complainant was obligated to attend a training session and that he was compensated for the time he spent at the plant, from which compensation Respondent deducted social security and withholding taxes. R. D. and O. at 6-7. The record supports these findings.

I agree with the ALJ's factual findings and adopt his conclusion that Complainant was an employee of the Respondent at the time he was discharged. The ALJ also noted that case law "reveals that 'employee' should be interpreted broadly enough to include prospective employees." R. D. and O. at 6. Although I generally concur in the ALJ's analysis'[4] it is unnecessary to consider that question since I have adopted the ALJ's conclusion that Complainant was an employee.

Accordingly, I adopt the Recommended Decision and Order of the ALJ. This case is remanded to the Wage and Hour Administrator, Employment Standards Administration, for an investigation on a priority basis in accordance with 42 U.S.C. § 5851(a) and 29 C.F.R. § 24.4 (1986).[5]

SO ORDERED.

WILLIAM E. BROCK
Secretary of Labor

Washington, D.C.

[ENDNOTES]

[1] Section 5851(a) provides:

> No employer, including a Commission licensee, an applicant for a Commission license, or a contractor or a subcontractor of a Commission licensee or applicant, may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee)--
> (1) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter or the Atomic Energy Act of 1954, as amended [42 U.S.C. 2011 et seq.], or a proceeding for the administration or enforcement of any requirement imposed under this chapter or the Atomic Energy Act of 1954, as amended;
> (2) testified or is about to testify in any such proceeding or;
> (3) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other manner in such a proceeding or in any other action to carry out the purposes of this chapter or the Atomic Energy Act of 1954, as amended [42 U.S.C. 2011 et seq.].

[2] It appears that the parties also stipulated that action by the Secretary "is due on or before June 12, 1986." *Id*. Neither the parties nor the ALJ can set time limits for action by the Secretary. The time requirements set forth in 29 C.F.R. § 24.6(b) do not impair the Secretary's authority to issue his final decision at a later time. *See Brock v. Pierce County*, 106 S. Ct. 1834, 1842, n.6; *Poulos v. Ambassador Fuel Co., Inc.*, No. 86-CAA-1, slip op. at 12 (Secretary's decision Apr. 27, 1987).

[3] Prior to these assignments, Complainant had been employed at the same nuclear power facility, The Peach Bottom Power Station, for two other employers and after both employments, filed charges against his employer for violations of the ERA. The first of these two complaints was resolved by settlement and the second was withdrawn. However, in both cases the investigations by this Department found merit in the complaints. R. D. and O. at 4.

[4] *See Flanagan v. Bechtel*, No. 81-ERA-7, slip op. at 5-9 (Decision of the Secretary, June 27, 1986).

[5] *See Rex v. Ebasco Services, Inc.*, No. 87-ERA-6, slip op. at 3, (Decision and Order of Remand of the Secretary, Apr. 13, 1987.